



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 30, 2004

Mr. James Downes
Assistant County Attorney
Harris County
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2004-10972

Dear Mr. Downes:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 216034.

The Harris County Hospital District (the "district") received a request for information relating to bids that the district received from executive search firms. You state that the district has released some of the requested information. You take no position with regard to the public availability of the rest of the requested information. You believe, however, that the remaining information implicates the proprietary interests of private parties. You have submitted the information in question. You also notified the interested parties of this request for information and of their right to submit arguments to this office as to why the remaining information should not be released.¹ We also received correspondence from Heidrick & Struggles, Inc. ("H&S") and Korn/Ferry International ("Korn/Ferry"). We have considered all of the submitted arguments and have reviewed the submitted information.²

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

²We note that the submitted information includes correspondence with the private parties that did not exist when the district received this request for information. The Act does not require you to release information that did not exist when the district received this request or to create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of the information that did not exist when the district received this request, and the district need not release that information.

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Abel, Fuller & Zedler, Spencer Stuart, TowerHunter, or Tyler & Company.³ Therefore, none of these parties has demonstrated that any of the submitted information is proprietary for purposes of the Act. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we note that H&S raises section 552.101 of the Government Code with regard to taxpayer information. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). H&S has not directed our attention to any law, and this office is not otherwise aware of any law, under which any of the submitted information that relates to H&S is considered to be confidential for purposes of section 552.101. Therefore, the district may not withhold any of the submitted information that relates to H&S under this exception.

Both H&S and Korn/Ferry raise section 552.110.⁴ This exception to disclosure protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *See* Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage

³Although you also notified Litchfield & Willis, Inc., of this request for information, we note that you have submitted no information that relates to Litchfield & Willis. We therefore assume that you have released any responsive information that relates to Litchfield & Willis, to the extent that such information existed when the district received this request. If not, then you must release any such information at this time. *See* Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

⁴We note that our discussion of the parties' arguments under section 552.110 is applicable only to the information that the district submitted to this office in requesting this decision. This decision does not address the public availability of any other information that H&S or Korn/Ferry may claim is excepted from disclosure under section 552.110. *See* Gov't Code §§ 552.301(e)(1)(D), .302.

over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private party's claim for exception as valid under section 552.110(a) if the party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.⁵ *See Open Records Decision No. 552 at 5* (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret, and the necessary factors have been demonstrated to establish a trade secret claim. *See Open Records Decision No. 402* (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See also Open Records Decision No. 661 at 5-6* (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

H&S contends that specified portions of its information are excepted from disclosure under section 552.110. Having considered H&S's arguments and reviewed the submitted

⁵The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Open Records Decision Nos. 319 at 2* (1982), *306 at 2* (1982), *255 at 2* (1980).

information, we conclude that the district must withhold H&S's customer information under section 552.110(a). We have marked that information. We also conclude that the district must withhold H&S's pricing information, which we also have marked, under section 552.110(b). We otherwise find that H&S has not demonstrated that any other submitted information relating to H&S qualifies as a trade secret under section 552.110(a). Likewise, we find that H&S has not made the demonstration required by section 552.110(b) that the release of any other submitted information that relates to H&S would be likely to cause H&S any substantial competitive harm. We therefore conclude that the district may not withhold any other submitted information that relates to H&S under section 552.110. *See Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, or qualifications and experience).*

Korn/Ferry also claims that specified portions of its information are excepted from disclosure under section 552.110. Having considered Korn/Ferry's arguments and reviewed the submitted information, we conclude that the district must withhold Korn/Ferry's customer information under section 552.110(a). We have marked that information. We otherwise find that Korn/Ferry has not demonstrated that any other submitted information relating to Korn/Ferry qualifies as a trade secret under section 552.110(a). Likewise, we find that Korn/Ferry has not made the demonstration required by section 552.110(b) that the release of any other submitted information that relates to Korn/Ferry would be likely to cause Korn/Ferry any substantial competitive harm. We therefore conclude that the district may not withhold any other submitted information that relates to Korn/Ferry under section 552.110. With regard to Korn/Ferry's professional fee and expense and pricing information, we note that the district has informed us that Korn/Ferry was the winning bidder. Federal cases applying the analogous Freedom of Information Act exemption to prices in awarded government contracts have denied protection for cost and pricing information, reasoning that disclosure of prices charged the government is a cost of doing business with the government. *See Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); see generally Freedom of Information Act Guide & Privacy Act Overview, 219 (2000).* Moreover, we believe that the public has a strong interest in the release of prices in government contract awards. *See Open Records Decision Nos. 514 (1988), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company).* Furthermore, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency).*

Lastly, we address H&S's claim under section 552.137. This exception provides as follows:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Thus, section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. Section 552.137 does not except from disclosure the types of e-mail addresses that are listed in section 552.137(c). Likewise, this exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees.

H&S believes that e-mail addresses contained in its information may be protected by section 552.137. We note, however, that these e-mail addresses fall within the scope of section 552.137(c). Therefore, the district may not withhold any of the submitted information that relates to H&S under section 552.137.

In summary: (1) the district must withhold H&S's customer and pricing information under section 552.110; and (2) the district also must withhold Korn/Ferry's customer information under section 552.110. The rest of the submitted information is not excepted from disclosure and must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

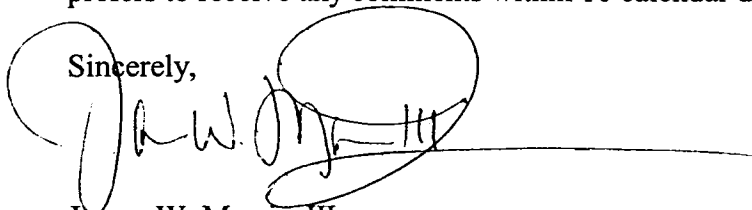
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 216034

Enc: Submitted documents

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